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IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1926

No. 6, Original

In Equity

STATE OF MICHIGAN,
Plaintiff,
vs.
STATE OF WISCONSIN,
Defendant.

ANSWER IN OPPOSITION TO MOTION TO MODIFY DECREE and BRIEF IN SUPPORT OF SAID ANSWER

PAUL W. VOORHIES,
Attorney General.

EDWARD A. BILITZKE,
Assistant Attorney General,
For the State of Michigan.

FRANKLIN DEKLEINE CO., PRINTERS AND BINDERS, LANSING

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1926

Number 9, Original

In Equity

STATE OF MICHIGAN,
Plaintiff,
vs.
STATE OF WISCONSIN,
Defendant.

ANSWER IN OPPOSITION TO MOTION TO MODIFY DECREE

ANSWER OF THE STATE OF MICHIGAN IN OPPOSITION TO THE MOTION OF THE STATE OF WISCONSIN FOR MODIFICATION OF THE DECREE ENTERED IN THE ABOVE CASE ON NOVEMBER 22, 1926, SO FAR AS SAID DECREE RELATES TO THE GREEN BAY SECTION.

Now comes the State of Michigan, by Paul W. Voorhies, Attorney General, for answer to the motion for modification of the decree made by the State of Wisconsin, appearing specially for the purpose of this answer, and states that said motion should be denied for the following reasons:

I

That the motion made by the defendant herein seeks to secure, after a lapse of upwards of five years, a rehearing of that part of the boundary dispute between the above named states, known as the Green Bay section; the said motion not having been made in the manner nor within the time prescribed by the rules of this court; the time for making such motion having long since elapsed.

II

That the decree announced by Mr. Justice Sutherland and entered on November 22nd, 1926, defining the boundary in said Green Bay section, not only by metes and bounds, but also by reference to fixed channels betwween certain islands therein named, is in complete accord with the decision of this Court delivered by Mr. Justice Sutherland on March 1st, 1926.

III

That after the decree proposed by the State of Wisconsin and the objections thereto made by the State of Michigan, were fully considered and argued before Mr. Justice Sutherland in his chambers, the decree herein was consented to by counsel representing the respective parties thereto.

IV

That the boundary in the Green Bay section as adopted in the decree (with the exception of the one word "by", which is a clear clerical error), was the result of a compromise between the said states, as will appear by the

affidavit of Meredith P. Sawyer, counsel for the State of Michigan, hereunto attached and marked "Schedule I", and made a part hereof.

V

That the true boundary in the Green Bay section as defined in said decree, is shown on the attached map and indicated as points "A", "H", "O", "Q", "S", and "R", and is in accord with the decision of this Court. That the erroneous insertion of the word "by" in the printed decree will not at this time enable counsel for Wisconsin to successfully claim that the decree does not carry into effect the decision of this Court. That said error is not fatal to said description for the reason that the metes and bounds description as embodied in the decree is prefaced by reference to fixed monuments which clearly show that the insertion of the word "by", causing the description to read "north by east" instead of "north east" is a clear clerical error.

VI

That the boundary which the State of Wisconsin by this motion asks to have established, shown on the attached map as points "A", "B", "C", "D", "E", "F" and "G', would establish a different and new boundary running through a portion of the middle of said Green Bay. That it was never heretofore contended by the State of Wisconsin that the boundary now here claimed should be the boundary between said states, or that said boundary should run in part through the middle of said Green Bay. This Court in its opinion, emphasized the fact that Michigan and Wisconsin were in agreement on the claim that the boundary through the Green Bay sec-

tion should be the "most usual ship channel". The Court said:

> "In determining the boundary through this section, the question is not embarrassed by differences of description. The calls of the Michigan Enabling Act are down the channel of the Menominee to 'the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the Middle of Lake Michigan.' The Wisconsin Enabling Act calls for the same boundary."

It will also be noted that in the decree proposed by Wisconsin (attached hereto as "Schedule 2"), Wisconsin asked that the boundary be the "most usual ship channel", rather than the middle of said Green Bay. The State of Wisconsin seeks herein by the formality of a motion, to obtain a rehearing for the apparent purpose of establishing a new and different boundary line inconsistent with the boundary which it proposed to have established as shown by said proposed decree, and inconsistent with the boundary as established and fixed by the decree of this Court, pursuant to the agreement of counsel, for the apparent purpose of securing valuable fishing rights in a part of the waters of Green Bay.

VII

That the new boundary which the State of Wisconsin seeks to have established, as shown by the metes and bounds description on page 8 of its motion, was not claimed by it in the original action before this court, nor was it contended for in the briefs filed by the State of Wisconsin on file in this Court. That in truth and in

fact, as will appear by the defendant's proposed decree and objections of the plaintiff thereto (Schedule "3"), the State of Wisconsin proposed a boundary line to be defined as "the most usual ship channel." That the State of Michigan objected thereto, claiming that the proposed boundary line was "too indefinite and uncertain and should be by courses and distances as shown upon the government charts in evidence in the case." That the State of Michigan thereupon proposed an amendment to said decree describing by metes and bounds the boundary through Green Bay, which was the description consented to by the State of Wisconsin and embodied in the decree of this court. That under the heading "ARGUMENT AND BRIEF" in Michigan's Objections to the proposed decree and amendments thereto, counsel for the State of Michigan clearly and concisely set forth their objections to the proposed decree in the following language:

"ARGUMENT AND BRIEF

First Objection

This objection relates to two specific tracts,

First, to the triangle in the waters of Green Bay, lying between the lines of a direct water course from the Menominee Harbor to the sailing objective opposite Chambers Island light and a course from Menominee Harbor to the most usual ship channel of Green Bay, and along that channel to the same sailing objective.

• • •

The language of the Michigan enabling act, 'down the main channel of the Menominee River, to the

middle of the most usual ship channel of Green Bay,' is the basis for Michigan's claim.

• • •

Michigan claims for it a construction that the line upon entering Green Bay at the mouth of the Menominee shall pass in a direct course to the middle of the most usual ship channel of the Green Bay.

• • •

The calls of both acts contemplate that the line from the mouth of the Menominee river shall be a straight line, therefore the shortest possible distance from that point to the 'center of the most usual ship channel of Green Bay.' Viewed in the light of the shipping at the time of the admission of both states, as shown by the record, there can be no question but what the 'most usual ship channel of Green Bay' was on the course extending lengthwise of the bay and as shown as the chartered course by plaintiff's exhibits 106 and 107.

Plaintiff therefore asks that the boundary from Menominee Harbor pass along a line at right angles to this Western channel course of the Green Bay as given on the charts, and thence along the chartered course. (Pltf's exbts. 106 and 107.)"

VIII

That at no time since the announcement of said decree have the parties hereto claimed the boundary line to be as indicated by points "A", "H", "O", "K", "J", and "X", on the attached map. That the group of islands lying north of Rock Island passage, consisting in part of St. Martins Island and Summer Island, were never claimed by the State of Wisconsin. That since the adop-

tion of said decree, said islands have concededly belonged to the State of Michigan, the State of Wisconsin making no claim thereto.

This answer is based upon the affidavit of Meredith P. Sawyer, hereunto attached, and upon the records and files in this court.

PAUL W. VOORHIES,
Attorney General,
EDWARD A. BILITZKE,
Assistant Attorney General,
Attorneys for Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN, Plaintiff, vs. STATE OF WISCONSIN, Defendant.	"Schedule I"

COUNTY OF MENOMINEE: ss.

Meredith P. Sawyer, being duly sworn, says:

That he is an attorney of the above entitled Court and acted as special counsel for the State of Michigan in the above entitled cause, in the above entitled Court, during the final arguments and negotiations and hearings upon settlement of the decree, and that he attended said proceedings in behalf of the State of Michigan under the direction of Andrew B. Doughterty, Attorney General of Michigan, with the assistance and counsel of Carl D. Mosier, then the Assistant Attorney General for Michigan.

Deponent further states that after the filing of the opinion of the Court in the above entitled matter, several conferences were held between the attorneys and technical witness for the parties and an expedition was made over the entire lower end of the Menominee River, all with a view to agreeing upon minor matters as to the location of the boundary and determining the necessity for an actual survey, and in this connection, examination was made of the situation in the harbor of Menominee at the mouth of the Menominee River.

Deponent further says that one of the issues raised between the parties by the decree proposed by the defendant and the counter proposals of plaintiff, had to do with the location of the boundary at the lower end of the Menominee River commonly known as the "Harbor", and in the waters of Green Bay directly in front of the City of Menominee, and the State of Michigan took the position that the boundary passed out to Lake Michigan along the middle of the main ship channel in Green Bay from a point in such channel opposite the Menominee River. It was a conceded fact that at the date of the definition of the boundary by Congress, there was no such thing as a ship channel in Green Bay running to the mouth of the Menominee River; there were at that time, two ship channels, both passing from Lake Michigan through Green Bay to the settlement at the foot of the Bay (now the City of Green Bay, Wisconsin). The Court, in its opinion, determined that the western channel was the most usual ship channel. The claims of Michigan in this respect are set forth on page five of the plaintiff's Objection to Proposed Decree on file in the above entitled Court, in the above entitled cause.

Deponent further states that an additional circumstance had to do with the final definition of said boundary at said point; the fact that a line passed down the middle of the main channel of the Menominee River as it existed at the time of the definition of the boundary by Congress, would pass entirely to the south of the present dredged channel and harbor entrance of Menominee. This would further result in throwing into Michigan a considerable amount of dock property which was generally considered to be in Wisconsin.

I have attached hereto a tracing taken from the diagram of the original Government Survey of the mouth of the Menominee River and I have penciled on this trac-

ing in red lines the approximate location of the dock lines and harbor piers of the present harbor, and with a blue line the location of the boundary as it would be if the definition of Congress were followed exactly and it will be noted that the terms of the decree depart from the language of the original definition in that under the decree the boundary passes down the middle of the dredged channel to a point midway between the outer ends of the harbor piers.

THIS LANGUAGE WAS INSERTED IN THE DECREE BY CONSENT OF THE PARTIES WHILE AT WASHINGTON ARGUING THE PROPOSED DECREE AND WAS THE RESULT OF A COMPROMISE BETWEEN THE PARTIES WHEREBY WISCONSIN WAIVED ANY OBJECTION TO THE MICHIGAN CLAIM THAT THE LINE WAS TO PASS OUT FROM THE HABOR EAST BY SOUTH TO THE SHIP CHANNEL AND MICHIGAN WAIVED ANY CLAIM TO THE DOCK PROPERTY SOUTH OF THE PRESENT DREDGED CHANNEL.

Deponent further states that in the decree of this Court as proposed, the line through Green Bay is defined as follows:

"Thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee River piers, thence East by South 7½ miles to the center of the most usual ship channel of the Green Bay; thence along said ship channel North by East ⅛th East, 8⅞ths miles; thence continuing along said ship channel North by East, ⅞ths East, 27 miles; thence, etc."

Deponent states that the last given course contains a typographical error. Deponent believes this occurred through the copying of the language of defendant's proposed amendments to the decree in which the same error appears as shown on page four thereof. These courses and distances were taken from the record of the testimony of Thomas R. Hasley and that in the said testimony the proper course is given as Northeast 7/8ths East, and that this is further shown by reference to the chart exhibit in evidence at the time.

Deponent further states that the said typographical error is apparent upon reference to said chart by reason of the fact that only by reading said course as Northeast 7/8ths East can the monuments referred to in the main definition of this section of the boundary be followed; that is to say, the boundary as defined by monuments "to the North of Green Island and Westerly of Chambers Island and through the Rock Island passage into Lake Michigan" • • • can be readily reconciled with the courses and distances by eliminating this word "by" and can only be reconciled in that way.

The Government charts in evidence in the case, show the courses and distances used with the exception of the first one from the river to the ship channel. The courses and distances given in the decree correspond to those given on the chart except for the word "by". It should be noted here that the bearings given on the chart are for entering the bay and those given in the decree are for an outward course and hence are reversed.

MEREDITH P. SAWYER.

Subscribed and sworn to before me this 3rd day of September, A. D. 1932.

MARION L. GERL,
Notary Public,
Menominee County, Michigan.
My commission expires Oct. 29, 1935.

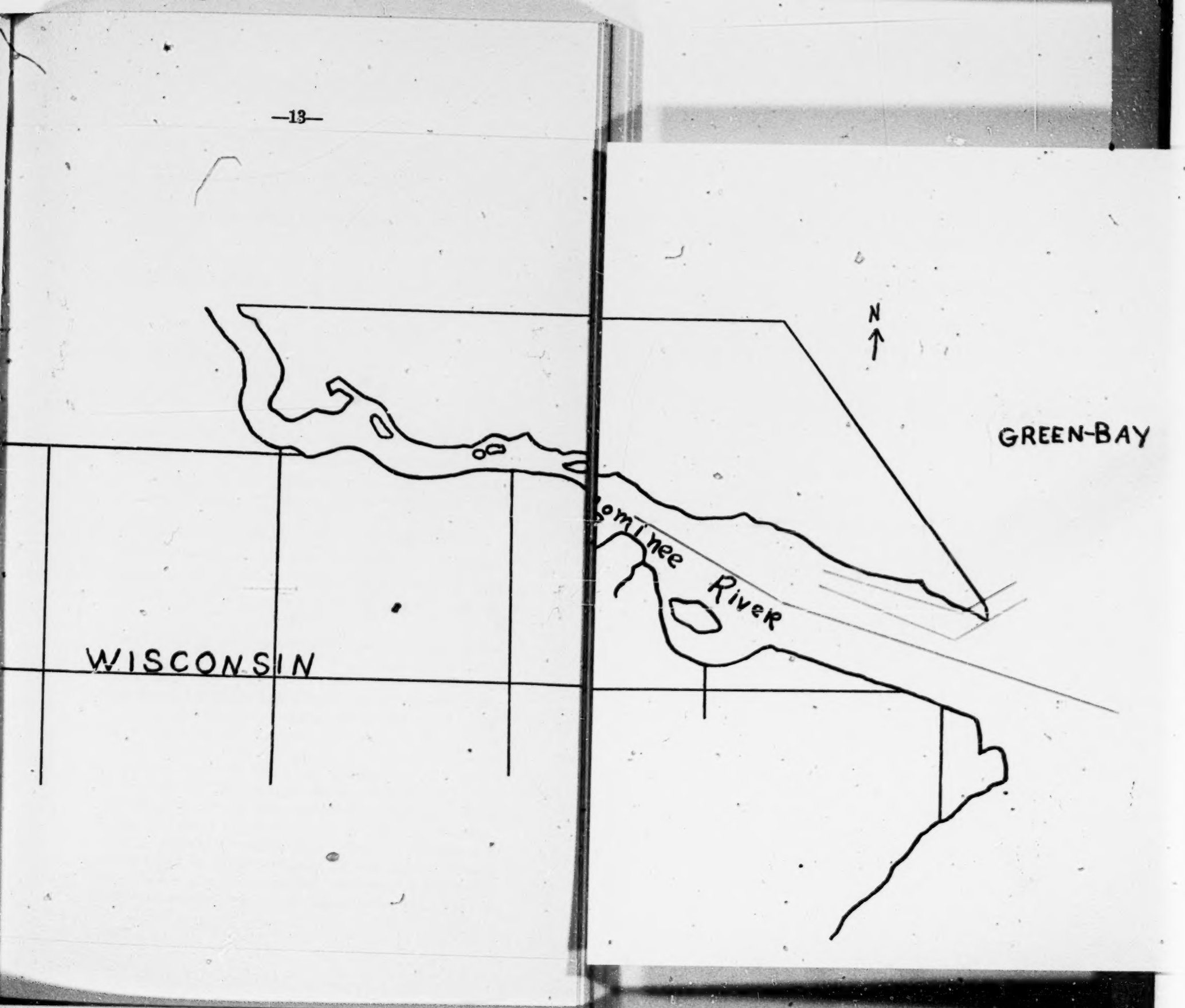
STATE OF MICHIGAN,
County of Menominee, } ss.

CLERK'S CERTIFICATE

I, Harry N. Gilbertson, Clerk of said County and Clerk of the Circuit Court for the County of Menominee, do hereby certify that Marion L. Gerl whose name is subscribed to the Certificate or Proof of acknowledgment of the annexed Instrument, and therein written, was at the time of taking such proof or Acknowledgment, a Notary Public in and for said County, duly commissioned and qualified to act as such; that his commission was dated on the 30th day of October, A. D. 1931, and will expire on the 29th day of October, A. D. 1935, and further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to the said Certificate or Proof of Acknowledgment is genuine. I further certify, that said instrument is executed and acknowledged according to the laws of this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of said Court, at the City of Menominee, this 3rd day of September, A. D. 1932.

HARRY N. GILBERTSON, Clerk.
By MARGARET EAGEN, Deputy Clerk.


N
GREEN-BAY
Menominee River
WISCONSIN

UNITED STATES OF AMERICA

IN SUPREME COURT

STATE OF MICHIGAN, Plaintiff, vs. STATE OF WISCONSIN, Defendant.	Schedule "2"

This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926, (270 U. S. 295).

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

> Beginning at the boundary line between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan and opposite the most usual ship channel leading into Green Bay from said lake, thence in a direct line to the middle of the most usual ship channel into Green Bay, thence along the middle of said channel which is north of Rock Island and north and west of Chambers Island, to the main channel of the Menominee River, thence along the main channel of said Menominee River and the Brule River, wherever the said rivers are free of islands, to Lake Brule, provided, that wherever islands are encountered in either of said rivers, the boundary line follows along the channel nearest the Michigan mainland so as to throw all such islands between the

mouth of said Menominee River and the Quinnesec Falls extending between Section 6, Township 38 North of Range 20 West of the Wisconsin survey, and Section 8, Township 39 North of Range 30 West in the Michigan survey, in said river into Wisconsin, and wherever islands are encountered in said rivers between said Quinnesec Falls and Lake Brule, the boundary follows the channel nearest the Wisconsin mainland so as to throw all such islands into Michigan, thence along the southern shore of Lake Brule in a direct line to the center of the channel between the Middle and South Islands in the Lake of the Desert, thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cram, said line between Lake Brule and the headwaters of said Montreal River to follow the line surveyed, marked, established and identified by William A. Burt in 1847, thence down the main channel of the Montreal River, being sometimes known as the East Branch of the Montreal River, to the mouth thereof.

The costs of this proceeding in this court shall be divided equally between the parties.

The clerk of this court may enter the foregoing decree for record.

By the Court:

Chief Justice.

IN THE SUPREME COURT OF THE UNITED STATES

In Equity

Original Number 9

October Term, 1926.

STATE OF MICHIGAN,
Plaintiff,
vs.
STATE OF WISCONSIN,
Defendant.

Schedule "3"

The above named plaintiff now comes and objects to the form and substance of the decree proposed by the defendant in said cause for the reasons that the provisions of said decree are contrary to the manifest intentions of this court as expressed in its opinion and are against the rights of the plaintiff.

FIRST OBJECTION

That the description in said decree is in the reverse order from that given in the opinion and in the statutory enactments and that as a result thereof plaintiff would be deprived of jurisdiction over an area of considerable extent in the waters of Green Bay and in that section of the Menominee River known as the Quinnesec Falls, and that the description of the boundary through Green Bay is too indefinite and uncertain and should be by courses

and distances as shown upon the Government charts in evidence in the case.

SECOND OBJECTION

That the said proposed decree does not in any way define what are to be considered islands in the Menominee River and that by the language of said decree the rights of plaintiff to the lands now held by it known as Merrymans Island and Sugar Island are jeopardized.

ANDREW B. DOUGHERTY,
Attorney General of Michigan,
CARL D. MOSIER,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel,
Attorneys for Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES

In Equity

Original Number 9

October Term, 1926

STATE OF MICHIGAN,
Plaintiff,

vs.

STATE OF WISCONSIN,
Defendant.

MOTION TO AMEND PROPOSED DECREE

Comes now the said plaintiff and moves the court to amend the proposed decree heretofore filed by defendant by striking out that portion of said decree describing the boundary between the plaintiff and defendant states and insert in lieu thereof the following:

"From Lake Superior through the middle of the main channel of the Montreal River, to the head waters thereof, as established in the survey of Captain Cram at the Junction of Pine River and Lehman's Creek, thence along the line of the survey of William A. Burt, of 1847, to the center of the channel between Middle and South Islands in Lake Vieux Desert, thence continuing along the line of said survey to the shore of Lake Brule, thence along the southerly shore of Lake Brule, to the center of the

main channel of the River Brule, thence down the center of the main channel of the rivers Brule and Menominee, to the center of the harbor entrance of said Menominee River, thence, east by south, seven and one-half miles, to the center of the most usual ship channel of the Green Bay, thence along said channel, north by east, one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east, seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north, to the boundary between the State of Michigan and the State of Wisconsin, in Lake Michigan. Provided, that, that section of the boundary in the Brule and Menominee Rivers, shall follow the main channel thereof, except that where islands occur in the Brule River, and in the Menominee River, down to, and inclusive of the Quinnesec Falls, the line shall pass through the channel nearest the Wisconsin Bank, so as to throw all such islands into Michigan, and where islands occur in the Menominee River below Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Providing further, that no land now occupied or taxed as a part of the State of Michigan, shall be considered as an island under the provision of the last clause hereof."

ANDREW B. DOUGHERTY,
Attorney General of Michigan,
CARL D. MOSIER,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel,
Attorneys for Plaintiff.

ARGUMENT AND BRIEF

First Objection

This objection relates to two specific tracts,

First, to the triangle in the waters of Green Bay, lying between the lines of a direct water course from the Menominee Harbor to the sailing objective opposite Chambers Island light and a course from Menominee Harbor to the most usual ship channel of Green Bay, and along that channel to the same sailing objective.

Second, the Quinnesec Falls section of the Menominee River.

1st Tract,

The language of the Michigan enabling act, "down the main channel of the Menominee River, to the middle of the most usual ship channel of Green Bay," is the basis for Michigan's claim.

This language is the effective grant never having been altered by enactment or use.

Michigan claims for it a construction that the line upon entering Green Bay at the mouth of the Menominee shall pass in a direct course to the middle of the most usual ship channel of the Green Bay.

This construction is in accord with the calls of the Wisconsin enabling act (U. S. Stat. At Large, Vol. 9, Page 7), where in a reverse order the boundary in the Green Bay section is as follows:

> "Thence running with the boundary line of the State of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menominee river."

The calls of both acts contemplate that the line from the mouth of the Menominee river shall be a straight line,

therefore the shortest possible distance from that point to the "center of the most usual ship channel of Green Bay." Viewed in the light of the shipping at the time of the admission of both states, as shown by the record, there can be no question but what the "most usual ship channel of Green Bay" was on the course extending lengthwise of the bay and as shown as the chartered course by plaintiff's exhibits 106 and 107.

Plaintiff therefore asks that the boundary from Menominee Harbor pass along a line at right angles to this Western channel course of the Green Bay as given on the charts, and thence along the chartered course. (Pltf's exbts. 106 and 107).

2nd Tract,

Defendant's proposed decree seeks to fix the Division point for the islands in the Menominee at the Upper, or Big Quinnesec Falls.

The language of the Wisconsin enabling act gives to Michigan all islands, "*down to and including* the Quinnesec Falls of the Menominee" opinion. (70 L. Ed. page 274).

Defendant's exhibit 198, sheet 21, shows the location of the Quinnesec Falls. We can see no justification for placing the division point at the Upper Falls.

Second Objection.

This objection involves land known as islands in the Menominee River, below Quinnesec Falls, which is now part of Michigan and would by terms of defendant's proposed decree pass to the jurisdiction of Wisconsin.

In the opinion of this court it is decided that the land commonly known as Merryland Island is not in fact an island, but part of the Michigan mainland.

The opinion adds, "two other so-called islands of small area in the same vicinity are in like situation." (Page 275).

Plaintiff's brief urged the point that three islands below Quinnesec Falls were being held by Michigan.

Joint investigation, by counsel, since the opinion, has developed that there are other tracts of land along the Michigan bank, of which their character as islands or mainland might be drawn in question.

Surely the opinion is inconsistent with the idea that Wisconsin is to have any land now occupied and taxed as a part of Michigan.

"The rule is well settled—that actual possession of a part of a tract by one who claims the larger tract, by color of title describing it, extends his possession to the entire tract, *in the absence of actual adverse possession of some part of it by another.*" (Opinion page 276).

The pleadings in the case would not warrant a decree granting the affirmative relief to Wisconsin, and Michigan has not been put in position to defend its present holdings.

Attention is directed to the answer of defendant wherein no claim is made for affirmative relief and we especially call attention to paragraph 24 and quote therefrom as follows:

> "Defendant alleges * * * that the boundary line claimed by the State of Wisconsin is the true boundary line and always has been such boundary line and the boundary line intended by Congress to mark the limits of sovereignty of the two respective States and that such boundary line has always been accepted by the parties to this controversy strictly in accordance with the claim of the State of Wisconsin. * * * That for the entire period since 1836 and now Wisconsin has openly exercised her right of

sovereignty over all territory within the line as claimed by said State of Wisconsin."

On page 17 of the Answer and the last paragraph thereof is found the following:

"Wherefore defendant prays that plaintiff take nothing by this complaint and that this action be dismissed and that it be adjudged that the boundary line as claimed by the State of Wisconsin is the true and correct boundary line between the State of Michigan and the State of Wisconsin."

There is nothing in the record to show that the land known as Sugar Island, which is a part of the city of Menominee, was ever claimed by Wisconsin; that it was ever surveyed and taxed as a part of Wisconsin.

The records in the case, (R. 222), show that the land known as Sugar Island is held and taxed as a part of Michigan.

Plaintiff has attached hereto certified copies of the portions of Assessment Roll of Menominee County, showing the taxation of this land in Michigan for ever sixty years.

Attached also is a map showing the dock line, in Menominee River, established by agreement between the cities of Menominee and Marinette in 1880. Sugar Island is on the Michigan side of the dock line. The other islands shown on this map near the Michigan bank are also taxed in Michigan as shown on the Assessment Rolls.

There is substantial record evidence of the land occupied and taxed as part of Michigan, and plaintiff's pro-

posed amendment protects her interests therein, without jeopardizing the rights of defendant.

ANDREW B. DOUGHERTY,
Attorney General of Michigan,
CARL D. MOSIER,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel,
Attorneys for Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES

Number 9, Original

In Equity

STATE OF MICHIGAN,
Plaintiff,
vs.
STATE OF WISCONSIN,
Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF ANSWER IN OPPOSITION TO MOTION TO MODIFY DECREE

The claim now here made by the State of Wisconsin is set forth at the beginning of its brief on page 10 as follows:

> "The motion is based, however, on the assumption that the decree through inadvertence and mutual mistake fails to carry into effect said decision of the court and that the court has the power to modify said decree so as to correct the error and carry into effect the decision of the courts as rendered. We are informed that the plaintiffs herein will not object to the jurisdiction and the power of the court to modify the decree."

The State of Michigan by its answer to this motion denies that the decree of this court settling the boundary dispute in the Green Bay section, fails to carry into effect

the decision of the court, and on the contrary contends that the decree of this court is in harmony with said decision.

The defendant is in error in believing that the State of Michigan will not object to the jurisdiction and power of the court at this time, to modify the decree. The State of Michigan in its answer to said motion now here made objects to the jurisdiction of this court to consider said motion, and questions the power of this court at this time to modify the decree.

The decision of this court determining the boundary in the Green Bay section (270 U. S. page 603), can be briefly summarized and stated as follows:

1. The Michigan Enabling Act and the Wisconsin Enabling Act both describe the boundary in the Green Bay section as "the center of the *most usual ship channel*".

2. That the evidence in the case showed two distinct ship channels, the one claimed by Michigan being shown on the attached map as points "A","M","N", and "P", and the one claimed by Wisconsin being described as a course which, after leaving the mouth of the Menominee River, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martins Island; thence through the Rock Island passage into Lake Michigan.

3. That the territory in dispute consisted of certain islands known as Chambers Island, Strawberry Island, Rock Island, Washington Island, Detroit Island and Plum Island, the said islands being within the two ship channels above described.

4. That the evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act was not convincing.

5. That the title of Wisconsin to the territory which is made up of the islands referred to was established by long possession and acquiescence.

6. That the claim of Wisconsin as to the location of the boundary be sustained.

The court then states that the parties may, if so advised, within thirty days thereafter submit the form of a decree more particularly to carry this opinion into effect.

The following is taken from the "Statement of Facts" found in the brief for the State of Michigan filed in the original cause, (page 33), which relates to the boundary in Green Bay:

> "The boundary in the Michigan Enabling Act is the center of the most usual ship channel.
>
> "The Wisconsin grant here follows the Michigan boundary. The Traverse from Lake Michigan to Green Bay is broken into five principal channels. The question here is as to whether Port des Morte or Rock Island passage was the most usual ship channel in 1836.
>
> "After entering the bay a southerly course permits the choice of either Strawberry passage or the passage west of Chambers Island."

The argument in behalf of the State of Michigan in support of the channel indicated on the attached map as points "A", "M", "N", and "P", is found commencing at page 78 of the brief filed by the State of Michigan in the original cause.

The claim of the State of Wisconsin is set forth on page 34 of its brief filed in the original action, as follows:

> "No apparent excuse is offered to the failure to assert claim to the Islands now claimed in this state throughout the period between 1836 and 1923, except the general allegation of lack of knowledge. * * *.

(Then follows the following head)

"'The most usual ship channel' means best or main channel."

"The claim of Michigan is based upon the proposition that the usual ship channel at that time lead through Death's Door, a statement which of itself rather negatives this assertion, for the reason that Death's Door was given the name of a dangerous passage and one ordinarily not resorted to. * * * ".

Again at page 61 of Wisconsin's brief filed in the original action, appears the following:

"An examination of the map of Green Bay shows beyond any question that the passage used in the lake route is the passage on the outside of Rock Island, and that the Port des Mortes passage narrower, and as its name indicates, somewhat more dangerous, would involve an unnecessary detour."

The conclusion of Wisconsin's brief, filed in the original action, is in part as follows:

" * * * if the court should be of the opinion that there is any doubt about the boundary line in Green Bay or in the Menominee River by reason of the fact that the exact line is not definitely laid out, identified and established by proper monuments, then it is submitted that all that is necessary to be done is to identify and lay out and mark the boundary in the Menominee River and in Green Bay in accordance with the boundaries as claimed by Wisconsin, and so as to include all of the islands and territory now claimed by Wisconsin." (Page 95 of said brief.)

On page 20 of the brief of defendant State of Wisconsin filed in the original action, appears a sketch of the

Green Bay section showing boundaries claimed by Michigan and Wisconsin.

The affidavit of Meredith P. Sawyer, attorney at law, who appeared as special counsel for the State of Michigan in the trial of the original cause, attached to the answer as Schedule 1, shows the following:

1. That after the filing of the opinion of this court, several conferences were held between the attorneys and technical witnesses for the parties and an expedition was made over the entire lower end of the Menominee River and examination was made of the situation in the harbor of Menominee at the mouth of the Menominee River.

2. That one of the issues between the parties raised by the proposed decree and the amendments thereto proposed by the State of Michigan pertained to the location of the boundary at the lower end of the Menominee River known as the Harbor, and in the waters of Green Bay directly in front of the city of Menominee; the State of Michigan taking the position that the boundary line passed out to Lake Michigan along the middle of the main ship channel in Green Bay from a point in such channel opposite the Menominee River. It was conceded that at the time the Act of Congress was passed defining the boundary there was no such thing as a ship channel in Green Bay running to the mouth of the Menominee River; that the only ship channels at that time ran through Green Bay to the foot of the bay which is now the City of Green Bay, Wisconsin.

3. That a new channel had been established at the mouth of the Menominee River by dredging to the north of the old channel which existed at the time the states were admitted to the Union. That the State of Wisconsin was desirous of adopting the new channel as the boundary between Michigan and Wisconsin, thereby acquiring valuable property to the south thereof as will

appear from the sketch attached to Mr. Sawyer's affidavit, (Schedule 1). That the decree as adopted provided that the boundary should run through the center of the *"harbor entrance"* of the Menominee River and thence in a direct line to the most usual ship channel of Green Bay, etc. That this language was inserted in the decree as a result of a compromise, the State of Wisconsin waiving any objection to the Michigan claim that the line was to pass out from the harbor East by South to the ship channel, and Michigan waived any claim to the dock property south of the present dredged channel.

4. That the insertion of the word "by" in that part of the description which reads: "Thence continuing along said ship channel North *by* East, 7/8ths East, 27 miles", was a typographical error. That deponent believes that it occurred through the copying of the language of defendant's proposed amendments to the decree. That the courses and distances were taken from the record of the testimony of Thomas R. Hasley and that in said testimony the proper course is given as "Northeast 7/8ths East", and that this is further shown by reference to the chart exhibit in evidence at the time. Deponent is of the opinion that the said typographical error is apparent upon reference to said chart by reason of the fact that only by reading said course as "Northeast 7/8ths East" can the monuments referred to in the main definition of this section of the boundary be followed; that is to say, the boundary is defined by monuments "to the North of Green Island and Westerly of Chambers Island and through the Rock Island passage into Lake Michigan." That the government charts in evidence in the case, show the courses and distances used with the exception of the first one from the river to the ship channel. That the courses and distances given in the decree correspond to those given on the chart

except for the word "by". That the bearings given on the chart are for entering the bay and those given in the decree are for an outward course and hence are reversed.

The metes and bounds description contained in the boundary line which the State of Wisconsin is seeking to have established as shown on pages 8 and 9 of the motion now before this court, is not supported by the testimony in the original case. The State of Wisconsin does not contend that this new boundary was either suggested or sought by it in the original hearing. On the contrary, the boundary line as established and settled by the decree of this court, with the exception of the first course running from the mouth of the Menominee River to the main channel, was established by government charts, and supported by the evidence in the original case.

The State of Wisconsin now claims (page 11) that it is important to have the boundary definitely fixed in Green Bay for the reason that said bay is recognized as one of the greatest fishing grounds in the United States and the question of jurisdiction on the bay is important to the fishermen in determining whether they are subject to the laws of Michigan or the laws of Wisconsin when engaged in fishing in the bay. We contend that the decree of this court definitely fixes the boundary in the Green Bay section. The decree defines the boundary, by reference to fixed monuments, as follows:

> "To the center of the harbor entrance of said Menominee River, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows, etc."

The Supreme Court of Michigan has adopted the general rule of construction with reference to descriptions to the effect that courses and distances give away to natural boundaries. See Turner v. Holland, 65 Mich. 463, 33 N. W. 883.

This court is familiar with the general rule of construction, aptly stated in 4 R. C. L. Sec. 34, as follows:

> "Under the priciple that where some particulars of the description in a deed do not agree, those which are uncertain and more liable to error and mistake must be governed by those which are more certain, various rules for the interpretation of descriptions of the location and boundary of lands have been evolved and are now frequently referred to in interpreting grants and deeds. Accordingly an order of precedence has been established among different calls for the location of boundaries of land, and, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, and thereafter to courses and distances."

On page 13 of defendant's brief in support of the motion herein appears the following:

> "The center of said ship channel as above outlined (new proposed boundary) is the one contended for by the defendant was adopted in the decision and is expressly described in the Enabling Act of both Michigan and Wisconsin."

The Enabling Act of Michigan described the boundary to "the center of the *most usual ship* channel of Green Bay". The new boundary line which Wisconsin now seeks to have established would run through the "center of *certain portions* of Green Bay," without regard

to the courses shown on the government charts in evidence on the trial of the original cause. Neither the enabling acts nor the testimony at the original hearing support the contention now made that the boundary should run through the center of the bay or equal distance between certain islands or shoals. Wisconsin does not contend that the boundary line sought to have established is in accordance with any government chart or that ships traveled such a course at the time the enabling acts were passed.

On page 13 of Wisconsin's brief in support of its motion, the following conclusion appears:

> "Where rivers or bays having well defined banks and are practically navigable throughout its whole area are the boundaries between states, the boundary runs through the center of the rivers or bays equally distant from the banks thereof."

This rule is foreign to the question which was before the court in the original case, and is not applicable to the issue between Michigan and Wisconsin as to the boundary line in Green Bay. This court based its opinion upon the Enabling Acts of Michigan and Wisconsin which defined the boundary as "the center of the most usual ship channel". The issue before the court in the original case, and the proofs taken in support thereof were for the purpose of determining the boundary as the "center of the most usual ship channel" in Green Bay. Having determined the center of the *most usual ship* channel, it mattered not whether such boundary would run through the center of the bay. Wisconsin cannot at this time by the formality of a motion take a position inconsistent with its position and contention at the time the original cause was argue and submitted.

The State of Michigan has no fear that the harmless error caused by the insertion of the word "by" in the one course referred to in the decree will hinder or prevent prosecution under the game laws of the State of Michigan. However, we do submit that the State of Wisconsin might well stipulate to the effect that the word "by", erroneously inserted in the one course, be stricken from the decree so that a reading of said decree will not confuse the ordinary layman who may not be familiar with the exact and complete language of the decree.

On page 14 of defendant's brief in support of its motion, appears the argument:

> "A great many features of law enforcement point to the conclusion that the line of demarcation between the jurisdiction of the two states should be in the 'center of the main channel'. In this connection it is common knowledge that the expert eye of navigators and fishermen as well as those who are not experts can more easily determine the center of the water than they can a two-thirds distance or any other fraction. * * * It is unfair to fishermen of Washington Island as well as to fishermen of Michigan territory to have the boundary line run close to its territory."

It will be noted from the foregoing that the State of Wisconsin contends that the boundary should be "in the center of the main channel, rather than the 'center of the *most usual ship* channel'." We contend that the boundary as established by the decree is clearly shown on the government's charts and other maps used by navigators. That the boundary line as established is definite, understandable and can be located by a navigator without difficulty. We contend that inasmuch as Congress fixed the boundary with reference to "the center of the *most usual ship* channel" which was later adopted in the

opinion of this court and embodied in the decree, that Wisconsin should not be permitted to now ask that a new and different boundary be established with reference to the center of the main channel without regard to the most usual ship channel at the time the act of Congress was passed. As proof that the boundary line as fixed in the decree and indicated on the map as points "A", "H", "O", "Q", "S" and "R", is the true boundary line, and recognized by Wisconsin as such, is shown by the statement of Wisconsin on page 15 of its brief herein as follows:

> "To have the game laws of Michigan enforced within a mile of Washington Island is unthinkable, likewise to enforce the Wisconsin game laws within a short distance of the Michigan line is equally objectionable."

This is further supported by the claim now made by Wisconsin (page 15) that back in 1836 sail boats could not have sailed on the course indicated for the reason that it was too near the shore. Looking through mere words into the substance of this motion this court will see that this is an effort on the part of Wisconsin to establish a new and different boundary line, thereby acquiring for the benefit of its citizens valuable fishing rights in a part of Green Bay.

The argument on page 15 of Wisconsin's brief now before the court, to the effect that the center of the channel should be the boundary rather than that fixed in the decree for the reason that as early as 1836 sail boats necessarily could not pursue a course close to the shore, might properly have been addressed to this court at the time the original case was before it for consideration.

On page 15 of Wisconsin's brief now before this court, the Attorney General contends that this court has the

power to modify the decree correcting a former decree inadvertently entered by *mutual mistake* in this case so as to carry out the decision of the court.

We contend that the decree of this court was not inadvertently entered by mutual mistake. The proposed decree on the part of Wisconsin and the proposed amendments thereto by the State of Michigan and objections attached to the motion as Schedule 2, together with the affidavit of Mr. Sawyer, and the long length of time that has elapsed since the decree was entered, conclusively show that the decree in this case was entered after a full and complete hearing before Mr. Justice Sutherland, in his chambers, and that it was consented to by the State of Wisconsin with full knowledge of its consequences. It is not difficult to understand that Wisconsin now complains of the boundary for the reason that certain fishermen of Wisconsin are desirous of obtaining the privilege of fishing in waters which now come under the jurisdiction of the State of Michigan without being required to purchase a Michigan license.

It will be noted that the State of Wisconsin does not seek to correct by this motion a clerical mistake or error claimed to have been made in the entry of the decree but seeks to obtain a review of a portion of the original case and to establish a new and different boundary not contended for by it in the original case and not supported by any testimony.

This court is familiar with Equity Rule 69 which requires that every petition for a re-hearing shall be verified by the oath of the party or some other person, and shall not be granted after the term at which the final decree of the court shall have been entered and recorded. That the court may in its discretion allow the petition to be filed at any time before the end of the next term of court. The court is also familiar with Equity Rule 72,

which provides that clerical mistakes in decrees arising from any accidental slip or omission, may at any time before the close of the term at which the final decree is rendered be corrected by the order of the court or circuit judge thereof, without expense or re-hearing.

The motion in this case is not supported by any affidavit.

While it is not embodied in the motion itself, yet the brief in support thereof indicates that the Attorney General of Wisconsin was proceeding under the impression that the State of Michigan would consent to the jurisdiction of this court to review that part of the original case as pertained to the boundary dispute in the Green Bay section. We believe that Wisconsin's error arises from the effort made by the State of Michigan to obtain the consent of Wisconsin to a stipulation striking the said word "by" from the metes and bounds description found in the decree. While the State of Michigan has sought Wisconsin's approval to such a stipulation, at no time has it treated the error as fatal. We submit that in fairness to this court, the State of Wisconsin should so stipulate.

For these reasons we respectfully submit that the motion to modify the decree made by the State of Wisconsin be denied.

PAUL W. VOORHIES,
Attorney General of Michigan.
EDWARD A. BILITZKE,
Assistant Attorney General.

SURVEY OF THE NORTHERN AND NORTHWESTERN LAKES

Made in obedience to Acts of Congress

and orders of

THE CHIEF OF ENGINEERS, U.S. ARMY

NORTH END OF LAKE MICHIGAN

INCLUDING

GREEN BAY

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AUTHORITIES

NOTES

MICHIGAN

LAKE

UPPER PENINSULA

MARINETTE

GREEN BAY

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E. 3/4 N.

E. 1/4 N. 10 3/4 MI.

N. 8° E. 7/8 E. 27 MI.

NE. 7/8 E. 27 MI.

N. 8° E. 7/8 MI.

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